No. 91-248

# In the Supreme Court of the United States

OCTOBER TERM, 1991

JOSEF SEHNAL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether questions posed to the jury by the prosecutor during his closing argument constituted plain error.

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### OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A16, is reported at 930 F.2d 1420.

### JURISDICTION

The judgment of the court of appeals was entered on April 17, 1991. A petition for rehearing was denied on July 10, 1991. Pet. App. B1. The petition for a writ of certiorari was filed on August 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

A grand jury returned a four-count indictment charging petitioner with making false statements on two corporate tax returns and on two personal income tax returns, in violation of 26 U.S.C. 7206(1). Following a jury trial in the District of Arizona, petitioner was convicted on the counts involving his corporate returns; the jury could not agree on the counts involving his personal returns. On September 18, 1989, the district court sentenced petitioner to a five-year term of probation on each count and a total fine of $20,000.

1. Petitioner started his own steel fabricating company, Scorpio, in November 1978. The business prospered. In September 1980, shortly after an IRS agent inquired about deductions that Scorpio had taken for personal expenses of petitioner and his wife, petitioner opened a trust account for his six-year old son Dennis, designating himself as sole trustee. By October 1981, petitioner had deposited into that account approximately $50,000 in checks that were issued as payment on Scorpio contracts for fabricated steel. Pet. App. A2-A3.

At one point, petitioner withdrew $35,800 from the trust account and deposited it into a joint personal checking account he shared with his wife. On October 31, 1981, petitioner withdrew $30,000 from the joint checking account and purchased five acres of land in his own name; he also obtained a permit to construct a corporate building, which was ultimately leased to Scorpio, on that land. The remaining funds in the trust account were spent on labor and materials used to construct the corporate building or on the ordinary living expenses of petitioner and his wife. Pet. App. A3-A4.

In February 1982, IRS Agent Laura Samson audited Scorpio's 1980 corporate return and determined that the company had improperly taken a number of deductions for personal expenses of petitioner and his wife. As a result, petitioner discharged his outside auditor-bookkeeper, Hy Spivack. Pet. App. A4.

In August 1982, Agent Samson met with petitioner's new accountant, Jonathan Grice, and agreed that certain problem areas could be adjusted after the filing of the Scorpio corporate return, which was due on February 28, 1981. Samson testified that the agreement concerned travel and entertainment expenses; Grice testified that he understood that income could also be adjusted. Grice told petitioner before he signed the return that it would be audited. Pet. App. A4-A5.

The checks deposited into the trust account were not reported either on the Scorpio corporate returns for the years ending February 28, 1981, and February 28, 1982, or on petitioner's personal income tax returns for 1981 and 1982. Neither Spivack nor Grice knew of those checks when they prepared the returns. Pet. App. A5.

2. During closing argument at trial, the prosecutor asked the jury to consider whether defense counsel had answered several hard questions. Pet. App. A7. After reminding the jury that the defense had no burden to do anything and posing a number of questions that were clearly directed to defense counsel rather than to petitioner, the prosecutor asked several questions using the male pronouns "he" and "him" rather than referring by name to defense counsel. *Id.* at A8. Defense counsel did not object to this line of argument, and in his closing argument defense

counsel said that he would not engage in a question and answer exchange with the prosecutor. *Ibid.*

3. On appeal, petitioner contended, inter alia, that the prosecutor violated petitioner's Fifth Amendment right not to testify by posing questions to the jury that the defense had failed to answer. The court of appeals determined that certain of the questions should not have been asked and that, had a defense objection been made, the district court should have sustained the objection. Pet. App. A12. The court of appeals also concluded, however, that defense counsel, "an able and experienced lawyer" who previously had made a successful objection at the beginning of the prosecutor's closing argument, had waived his objections by choosing to remain silent. *Ibid.* Based on its review of the entire record, the court of appeals concluded that the comments were not plain error because the comments did not lead to a miscarriage of justice. *Id.* at A13.

## ARGUMENT

Petitioner claims that his case warrants review by this Court because there is a conflict among the circuits regarding the proper application of the harmless error rule of *Chapman* v. *California*, 386 U.S. 18 (1967), to comments made by a prosecutor during closing argument. Pet. 7-10. That argument is meritless.

1. This case involves the plain error doctrine, not the harmless error rule. The Ninth Circuit properly decided this case under the plain error standard of review set forth in *United States* v. *Young*, 470 U.S. 1 (1985), because defense counsel did not object at trial to the portion of the prosecutor's closing argument that petitioner challenged on appeal. Thus, on

appeal the Ninth Circuit properly reviewed petitioner's claim for plain error, under Fed. R. Crim. P. 52(b), rather than for harmless error, under Fed. R. Crim. P. 52(a).

The plain error rule authorizes an appellate court to correct only "particularly egregious errors" that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Young*, 470 U.S. at 15, quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982), and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). As this Court noted in *Young*, "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" 470 U.S. at 15, quoting *United States* v. *Frady*, 456 U.S. at 163 n.14. Petitioner does not maintain that his claim merits review under that standard, and his fact-bound claim would not warrant review by this Court even if he had made such an argument.

As the court of appeals determined, there was no dispute that petitioner had signed the tax return and that he knew it was false; petitioner's only real defense was that he relied in good faith on the advice of his accountants, Spivack and Grice. Pet. App. A13. But each accountant testified that he was unaware of the trust account, so any advice they gave petitioner was based on his incomplete disclosure of the relevant facts. *Ibid.* Moreover, as the court of appeals concluded, there was no affirmative evidence of petitioner's good faith reliance on the advice of his accountants even if their testimony were discounted. *Id.* at A14. Under the circumstances, any error in the prosecutor's phrasing of his argument did not rise to the level of "plain error" because it could not have

"had an unfair prejudicial impact on the jury's deliberations." *United States* v. *Young*, 470 U.S. at 17 n.14.

2. Contrary to petitioner's claim, the decision in this case does not conflict with the decision of any other court of appeals. Petitioner cites *United States* v. *Skandier*, 758 F.2d 43 (1st Cir. 1985), and *Eberhardt* v. *Bordenkircher*, 605 F.2d 275 (6th Cir. 1979), but each of those cases applied the *Chapman* harmless error standard, not the plain error standard that the Ninth Circuit applied in this case.[1] In *Skandier*, defense counsel sought to make an objection at a bench conference, but was told by the district court that a conference was unnecessary, because the prosecutor had erred; the district court then gave a curative instruction. The First Circuit applied the *Chapman* standard and found the error harmless. 758 F.2d at 45-46. In *Eberhardt*, defense counsel objected to the prosecutor's remarks, and the Sixth Circuit applied the *Chapman* standard. 605 F.2d at 278-280.

Although the Tenth Circuit made a passing reference to *Chapman* in *United States* v. *Barton*, 731 F.2d 669, 675 (1984), that court did not hold that the *Chapman* harmless error standard and the *Young* plain error standard are interchangeable. Moreover, in conducting a plain error analysis in *Barton* the Tenth Circuit relied on its description of that analy-

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[1] Moreover, this Court has already answered the question framed in the petition: "Whether a prosecutor's improper comments on a defendant's failure to testify may ever be excused as harmless error." Pet. i. In *United States* v. *Hasting*, 461 U.S. 499 (1983), this Court held that a prosecutor's comment on a defendant's failure to testify can be, and in that case was, harmless error. See generally *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991).

sis in *United States* v. *Young*, 736 F.2d 565 (10th Cir. 1983), which this Court subsequently criticized in the course of reversing the judgment of the court of appeals, 470 U.S. 1 (1985).[2] Accordingly, there is no reason to assume that the Tenth Circuit would still apply the approach that it once described in *Young* and *Barton*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The *Young* case was decided before the *Barton* case, but was reported in a later volume of the Federal Reporter.

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